United States Department of Labor
Employees' Compensation Appeals Board

L.N., Appellant	)	
and	)	**Docket No. 08-1069**
	)	**Issued: September 19, 2008**
SOCIAL SECURITY ADMINISTRATION, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2008 appellant filed a timely appeal from Office of Workers' Compensation Programs' decisions dated March 5 and September 26, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant is entitled to a schedule award for greater than the five percent permanent impairment of the right upper extremity already awarded.

FACTUAL HISTORY

This is the second appeal before the Board. On March 28, 2002 appellant, a 48-year-old service representative, injured her right wrist and left knee. She filed a claim for benefits, which the Office accepted for left knee strain, contusion of the left knee and contusion of the right wrist. Appellant underwent arthroscopic surgery for the right wrist on January 14, 2003. In a report dated September 2, 2004, Dr. Nicholas Diamond, an osteopath in orthopedic surgery, found that appellant had a right upper extremity impairment of 26 percent and a left lower extremity

impairment of 11 percent pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) (A.M.A., *Guides*). He made the following impairment ratings: Sensory deficit right radial nerve, 4 percent impairment under Table 16-10, page 482 and Table 16-15, page 492; right grip strength deficit, 20 percent impairment under Table 16-32 and Table 16-34, page 509. This amounted to a combined right upper extremity impairment of 23 percent impairment. Dr. Diamond added 3 percent impairment for pain pursuant to Table 18-1, page 574, for a total 26 percent right upper extremity impairment.

Using Dr. Diamond's findings, an Office medical adviser found that appellant had a five percent permanent impairment of the right upper extremity and an eight percent permanent impairment of the left lower extremity pursuant to the A.M.A., *Guides*. He disallowed Dr. Diamond's rating based on strength grip, finding that under section 16.8a at page 508 of the A.M.A., *Guides*, decreased strength calculations cannot be rated together with a rating based on pain. Regarding the right upper extremity, the Office medical adviser found that appellant had a 5 percent impairment based on radial sensory loss, the maximum rating under Table 16-15 at page 492; this 5 percent rating translated to a Grade 3 impairment, 60 percent, at Table 16-10, page 482. He then multiplied 60 times the five percent impairment for a three percent radial impairment. The Office medical adviser calculated an additional two percent pain-related impairment pursuant to Table 18.1 at page 574, for a total right upper extremity impairment of five percent. On September 6, 2005 the Office granted appellant a schedule award for a five percent permanent impairment to his right upper extremity and an eight percent permanent impairment to his left lower extremity for the period September 2, 2004 to May 30, 2005, for a total of 38.64 weeks of compensation. By hearing representative decision dated March 1, 2006, an Office hearing representative affirmed the September 6, 2005 schedule award decision.

In a January 24, 2007 decision,[1] the Board set aside the Office's September 6, 2005 and March 5, 2006 decisions. The Board, noting that the Office medical adviser had combined a three percent sensory deficit impairment with an additional two percent impairment for pain pursuant to Chapter 18, stated that section 18.3b of the A.M.A., *Guides* cautions examiners against using this chapter to rate pain-related impairment for any condition that can be adequately rated on the basis of the body and organ impairment systems given in other chapters of the A.M.A., *Guides*.[2] The Board found that the evidence of record did not explain why appellant would be entitled to an additional rating for pain pursuant to Chapter 18. It therefore set aside the Office's finding with regard to the degree of impairment to appellant's right upper extremity and remanded to the Office for an explanation as to why and how appellant's pain was rated pursuant to Chapter 18. The complete facts of this case are set forth in the Board's January 24, 2007 decision and are herein incorporated by reference.[3]

[1] Docket No. 06-1735 (issued January 24, 2007).

[2] A.M.A., *Guides* 571; Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700 Exhibit 4 (June 2003).

[3] The award for an eight percent left lower extremity impairment is not at issue before the Board.

In a January 30, 2007 report, the Office medical adviser asserted that he rated the additional two percent for pain for two reasons; upper extremity pain and sensory loss. He stated:

> "The first reason is the loss of the radial sensory innervation that is related to the surgical procedure and interruption of the sensory nerve fibers; *i.e.,* a specific neurologic lesion that has loss of sensation of the superficial radial nerve.
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> "However, in addition to this loss of sensory innervation, [appellant] also has a positive Finkelstein's test as noted in Dr. Diamond's report. The Finkelstein's test is a test whereby the thumb is flexed and adducted to put stress on the tendon sheaths that are associated with de Quervain's tendinitis of the thumb. This pain on range of motion of the thumb is of a mechanical nature due to the pain and inflammation associated with the tendon sheath swelling that is found in de Quervain's disease; *i.e.,* tendinitis.
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> "Therefore, this pain is associated with a totally different etiology than the actual partial destruction of the superficial radial nerve as a result of the operative procedure. The pain associated with de Quervain's disease is mechanical in nature and related to stretching of the sensitive tendon sheath. Therefore, although the A.M.A., *Guides* sometimes combines pain with sensory loss, in this instance the pain for which I recommended two percent is a totally separate mechanism than the superficial radial nerve damage.
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> "Therefore, it was my recommendation that utilizing page 574, [F]igure 18-1, that this claimant was entitled to a pain award due to the actual ongoing tendinitis of the thumb associated with de Quervain's disease. The maximum that can be awarded is three percent. I recommended two percent, one percent less than the maximum.
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> "When pain awards are made, they are added and not combined with the use of the Combined Values Chart, page 604. Therefore, the Combined Values Chart was not utilized, and the two percent was added to the three percent with a recommendation of five percent for the right upper extremity."

By decision dated March 5, 2007, the Office found based on the Office medical adviser's supplemental report that appellant was entitled to no greater than a five percent right upper extremity impairment schedule award.

By letter dated March 12, 2007, appellant's attorney requested an oral hearing, which was held on July 18, 2007. Appellant did not submit any additional medical evidence.

By decision dated September 26, 2007, an Office hearing representative affirmed the March 12, 2007 decision.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[4] sets forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[5] However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.[6]

ANALYSIS

Following the Board's January 20, 2007 decision, the Office medical adviser submitted a thorough, well-reasoned explanation to support his rating of an additional two percent impairment based on pain. He provided two reasons for his pain rating: the loss of the radial sensory innervation related to appellant's surgical procedure and interruption of the sensory nerve fibers, a specific neurologic lesion which included loss of sensation of the superficial radial nerve; and a positive Finkelstein's test as noted in Dr. Diamond's report. The Office medical adviser properly noted that this positive test indicated that appellant had pain on range of motion of the thumb, pain and inflammation associated with the tendon sheath swelling found in de Quervain's disease; *i.e.,* tendinitis. Dr. Diamond explained that this pain is associated with a totally different etiology than the actual partial destruction of the superficial radial nerve as a result of the operative procedure. Therefore, the Office medical adviser's recommended two percent rating for pain was based on an entirely separate calculation than that for the superficial radial nerve damage. He therefore accorded a two percent pain award, or one percent less than the maximum three percent award as provided for under Figure 18-1 at page 574, for ongoing tendinitis of the thumb associated with de Quervain's disease. The Office medical adviser then properly added the three percent and two percent pain awards for a total five percent impairment for the right upper extremity. The Board finds that the Office properly credited the Office's medical adviser's supplemental January 30, 2007 report, which was sufficiently well rationalized, based on reasoned medical opinion and provides sufficient support for an additional two percent impairment for pain. This finding was proper and supported by the applicable protocols of the A.M.A., *Guides*. The Board affirms the March 5, 2007 Office decision.

Subsequent to the Office's decision, appellant requested an oral hearing but did not submit any additional medical evidence. She has not established that she is entitled to a schedule award for more than a five percent impairment of the right upper extremity.

Therefore, as there is no other probative medical evidence establishing that appellant sustained any additional permanent impairment, the Board affirms the Office's March 5 and

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[4] 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

[5] 5 U.S.C. § 8107(c)(19).

[6] 20 C.F.R. § 10.404.

September 26, 2007 decisions finding that appellant was not entitled to more than a five percent permanent impairment to her right upper extremity.

CONCLUSION

The Board finds that appellant has no more than a five percent impairment of the right upper extremity.

ORDER

IT IS HEREBY ORDERED THAT the Office's September 26 and March 5, 2007 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: September 19, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board